



## ***LEASE LETTERS: Clarifying Environmental Liability When Leasing Property***

### **OVERVIEW**

As part of the State of Wisconsin's 1997-99 biennial budget, a number of **brownfields initiatives** were enacted to encourage the redevelopment of properties where contamination is suspected or confirmed. One particular initiative was enacted to allow the Department of Natural Resources (DNR) to issue **lease liability clarification letters**. These letters are intended to clarify for persons who lease property whether or not the DNR would consider them liable for existing contamination on the leased property. The overall intent of this provision is to encourage productive use of these properties, yet continue to require those responsible for the contamination to conduct appropriate investigation and cleanup actions.

### **BACKGROUND**

Most investigations and cleanups in Wisconsin are undertaken pursuant to the Hazardous Substance Spill Law, s. 292.11, Wis. Stats. This law requires a person who "possesses or controls" a hazardous substance which is discharged, or who "causes" a discharge of a hazardous substance, to take the actions necessary to restore the environment to the extent practicable and to minimize the harmful effects of the discharge.

Under certain circumstances, persons who lease contaminated properties may be held responsible for cleaning up the property because they "possess or control" the hazardous substance discharge.

Section 292.55, Wis. Stats., allows the DNR to clarify whether a tenant would be considered to "possess or control" the discharge of a hazardous substance under the Spill Law. If certain conditions are met, the DNR will issue a letter to the potential tenant clarifying that the DNR would not consider them responsible for existing contamination merely by virtue of their status as tenants.

**Tenants may still be held liable under the Spill Law if they caused or contributed to the existing contamination, take actions that exacerbate the degree or extent of existing contamination, or cause or contribute to a new hazardous substance discharge on the property.**

The letters are designed only to assure tenants who had no role in causing or contributing to the existing contamination on the property that they will not be held responsible by the DNR for cleaning up that contamination.

## **GUIDANCE**

This guidance was developed to help potential tenants and owners of contaminated properties to understand: (1) the purpose of the lease letter; and (2) the steps they must take and site-specific conditions they must meet to acquire the letter. While the availability of each letter will be based on property-specific information, the following questions and answers should provide general guidelines for determining when a person is eligible for the letter, the criteria they must meet and the procedures they should follow.

### **1. What types of discharges does the lease letter address?**

A hazardous substance must be discharged to the property, either to groundwater or soil. Hazardous substances are broadly defined, and include any substances which pose a substantial present or potential hazard to human health or the environment. Examples of what constitutes a discharge include leaking underground storage tanks, industrial spills or dumping of hazardous substances.

### **2. Who can request the lease letter?**

Any person, either the lessor or the lessee, can request the letter regarding a particular lease. This includes: individuals, governmental bodies, corporations, partnerships or associations. However, the lessee cannot have caused or be in any way responsible for the existing contamination.

### **3. What site-specific factors will the DNR evaluate in determining whether a person caused, possesses or controls a hazardous substance discharge at a property they intend to lease?**

The DNR will generally evaluate the following to determine whether or not to issue a lease letter:

- whether the person caused the discharge of the hazardous substance on the property either individually or as the owner of a business or entity, which includes a subsidiary or parent corporation - persons who cause the discharge are liable for the contamination;
- current information regarding the existence and extent of any hazardous substance discharges on the property;
- whether the person would exercise “control” of activities on a property, such as the lease of an underground storage tank, that could result in the discharge of a hazardous substance;
- whether the person agrees to provide reasonable access to the property to any persons responsible for the discharge, their consultants, and the DNR - access may be required for environmental testing and/or remediation;
- whether the person agrees to minimize, to the extent practicable, the placement of any structures in areas of the property impacted by environmental contamination or in areas that would prevent the conduct of any investigative or remedial work.

### **4. How does a person obtain a lease letter?**

A person may request a lease letter by submitting a completed “Lease Letter Request Application” (DNR form 4400-207). In general, the DNR will need the following information to determine, on a case-by-case basis, whether to issue the letter.

- 1. A copy of the lease.** A DNR attorney will review the lease to determine whether the person would “possess or control” a hazardous substance discharge under the lease.
- 2. A letter documenting the proposed use of the property under the lease.** The letter should be as detailed as possible and include a discussion of how the proposed use will not interfere with any cleanup of a hazardous substance discharge. A site plan that identifies the proposed use and the existing contamination should be included with this letter.
- 3. Information sufficient to identify the type and extent of any hazardous substance discharges on the property.** There must be environmental pollution on the property in order for a clarification letter to be issued. Information identifying the type and extent of contamination is necessary to assist the DNR in determining whether the lessee would possess or control a discharge under the terms of the lease.
- 4. Submit the fee.** Persons requesting a lease liability clarification letter must pay a fee, in advance, for processing and issuing the letter. Current fee information is available on the Bureau for Remediation and Redevelopment’s web site, <http://www.dnr.state.wi.us/org/aw/rr/>, or from the Regional Team Supervisor listed on page 5.

**5. What information about the hazardous substance discharge does the DNR need to make the determination that a person would not possess or control that contamination under a lease?**

The information necessary for the department to determine whether a person would possess or control a hazardous substance discharge under a lease will vary depending on the nature and extent of the discharge and the proposed use of the property. Ordinarily, a Phase I Environmental Assessment and a Phase II Assessment, or equivalent information, will be sufficient for the department to make the determination.

In some instances, more extensive information on the degree and extent of contamination may be necessary. In addition, the person should show that no material changes have occurred at the site since the investigations were conducted which may have resulted in a discharge.

**6. What is a Phase I and Phase II Assessment?**

DNR Fact Sheet #3: “Step One of Conducting a Thorough Environmental Investigation: Phase I Environmental Assessment and a Phase II Scope of Work” (Publication #RR-510-95) describes in detail the types of information and investigation involved. Briefly, a Phase I Environmental Assessment documents the historical uses of a property and identifies areas of the property where contamination may be present. A Phase II assessment involves sampling for contaminants in those areas identified in the Phase I where contamination may be present. A DNR Fact Sheet, “Selecting

An Environmental Consultant” (Pub. #RR-502-Rev95) provides useful information on how to find a consultant qualified to conduct these investigations.

#### **7. Who may compile the information about the hazardous substance discharge?**

Either the owner or the lessee of the property may compile the information about the hazardous substance discharge. What is important for both parties is that the information compiled is complete. The lease letters only provide clarification for the lessee that he/she would not be considered to “possess or control” contamination that is known to the DNR.

For the owner, complete documentation of the contamination that exists on the property will protect him/her from liability for discharges that are caused by the tenant. For the tenant, complete documentation will protect him/her from liability for contamination that the tenant did not cause and did not possess or control under the lease.

#### **8. What if no discharges of hazardous substances are documented on the site?**

There is no need to obtain a lease letter. Moreover, the DNR cannot determine whether a person would possess or control a hazardous substance discharge on the property if there is no documented discharge.

#### **9. What if a person who receives a lease letter later refuses to allow access to the leased property?**

The lease letter will be conditioned upon granting the DNR and parties responsible for a discharge access to the property. Allowing the DNR, the responsible parties and their consultants to have reasonable access to the property is necessary to ensure that the contamination is cleaned up. If access is denied, the DNR may determine that the lessee is exercising “control” over the hazardous substance and may be liable for investigation and cleanup of any hazardous substance discharges on the property.

#### **10. Is the lease letter transferable to subsequent lessees?**

No, the letters are not transferable between parties. When a subsequent tenant would like a letter clarifying whether the DNR considers them liable for contamination on the property, that person will need to request a letter from the DNR and provide the information necessary for the DNR to issue him or her a new lease letter.

#### **11. Who should I contact if I am interested in requesting a lease letter?**

Persons interested in receiving a lease letter should contact their local DNR regional office. If you need information about which DNR staff person is assigned to the location of the property, you may receive assistance by calling the Regional Team Supervisors at the following locations:

South Central Region, (608) 275-3241

South East Region, (414) 263-8561  
 North East Region, (920) 492-5860  
 West Central Region, (715) 839-3710  
 Northern Region, (715) 365-8990

See the map of the DNR Regions for further reference. Additional publications can be ordered from the Remediation and Redevelopment Program by calling 800-367-6076 (in-state long distance), or 608-264-6020 (local and out-of-state long distance).

**DNR NORTHERN REGION**

P.O. Box 818  
 Rhinelander, WI 54501  
 (715) 365-8900

**DNR NORTHEAST REGION**

1125 N. Military Avenue  
 P.O. Box 10448  
 Green Bay, WI 54307  
 (920) 492-5800

**DNR SOUTH CENTRAL REGION**

3911 Fish Hatchery Road  
 Fitchburg, WI 53711  
 (608) 275-3266

**DNR SOUTHEAST REGION**

2300 North Martin Luther King Drive  
 P.O. Box 12436  
 Milwaukee, WI 53212  
 (414) 263-8500

**DNR WEST CENTRAL REGION**

P.O. Box 4001  
 Eau Claire, WI 54702  
 (715) 839-3700

